Supreme Court of the United States.

WILLIAM W. BRAUER, FREDERICK C. BRAUER and THE RELIANCE MARINE INSURANCE COMPANY, LIMITED, of Liverpool,

Libellants,

against

COMPANIA DE NAVIGACION LA FLECHA, owner of the steamer HUGO,

Respondent and Appellant.

No. ~~296.~~ 249.

October Term, 1896.

BRIEF FOR THE APPELLANT.

This action originated in the District Court of the United States for the Southern District of New York, in a libel filed March 25th, 1892, by the libellants, who were the owners and insurers of one hundred and sixty-five head of cattle shipped at New York October 24th, 1891, on the steamer *Hugo*, for delivery at Liverpool, England.

The libel claimed damages in respect to one hundred and twenty-six head of cattle lost from the steamer during the voyage (*Libel pp. 1-3*).

The decree of the District Court was in favor of the libellants for the value of sixty-three head of cattle and of the freight prepaid thereon (*Decree p. 184*).

Both parties appealed from the decree and assigned errors. The errors assigned by the respondent related not only to the amount of the loss, but to the allowance of any decree against the respondent, error being assigned to the findings of the District Judge and to his refusal to give to the respondent the

benefit of the exemptions set forth in the bill of lading *(pp. 186, 187)*.

Upon the argument of the appeal in the Circuit Court of Appeals Judges SHIPMAN and LACOMBE directed that the decree of the District Court be affirmed *(Opinion, pp. 188–195)*, and an order to that effect was accordingly entered March 18th, 1895 *(Order, pp. 196, 197)*.

Judge WALLACE dissented from the majority of the Court and held that the loss of the cattle was due to a peril of the seas and not to any default of the respondent or its servants *(Opinion, p. 196)*.

On the 1st day of April, 1895, the respondent submitted to this Court its petition for a writ of *certiorari*, and on the 10th day of April such writ was issued in the usual form (*Writ of Certiorari, p. 198)*.

Statement of Facts.

In October, 1891, the libellants, William W. Brauer and Frederick C. Brauer, composing the firm of W. W. Brauer & Company, shipped on board the respondent's steamer *Hugo*, at New York, one hundred and sixty-five head of cattle, to be delivered at Liverpool.

The shipment had been provided for in a contract made two weeks earlier between the agent of the *Hugo* and the libellants, W. W. Brauer & Company.

By the terms of this contract, dated October 10, 1891, which was put in evidence by the libellants, the respondent let to the shippers

> " space for the transportation of live cattle on the steamer " *Hugo*, intended to sail from New York about October 24, " 1891, for Liverpool, England, for about 160 live cattle on the " upper deck * * * at the rate of fifty shillings British " sterling for each animal shipped on open decks " *(Exh. 2, p. 132)*.

The shipper agreed to prepay freight on the number of cattle shipped at New York,

> " vessel lost or not lost, and irrespective of the number landed " at the port of destination, and the shipper assumed all risk " of mortality or accident, however caused, throughout the " voyage " *(Exh. 2, p. 132)*.

Stalls were to be erected at the steamer's expense, and the steamer undertook to supply water for the use of the animals, space for their fodder, suitable gangways for loading the cattle, and free passage over and back to the drovers in charge of the animals (*Exh. 2, p. 132*).

It was further provided in the agreement that

"The line form of live stock bill of lading to be used "for cattle to be shipped under this contract, and its "conditions to govern any questions not provided "herein, subject to United States Government inspection" (*Exh. 2, p. 133*).

Under this agreement the libellants W. W. Brauer & Company, shipped on board the *Hugo* at New York, October 24, 1891, one hundred and fixty-five head of cattle, and, in accordance with the terms of the agreement, received a bill of lading, the material portions of which were as follows:

"Received in apparent good order and condition by the "Spanish steamer *Hugo*, from Wm. W. Brauer & Co., to be "transported by the good ship *Hugo*, now lying in the port of "New York, and bound for Liverpool, one hundred and sixty-"five live cattle on deck.

"On deck at owners' risk, steamer not to be held accounta-"ble for accident to or mortality of the animals from what-"ever cause arising. * * *

"It is mutually agreed that the carrier shall not be liable "for loss or damage occasioned by causes beyond his control, by "the perils of the sea, or other waters. * * * by collisions, "stranding or other accidents of navigation of whatsoever kind "(even when occasioned by the negligence, default or error in "judgment of the pilot, master, mariners or other servants of "the ship owner, not resulting, however, in any case, from "want of due diligence by the owners of the ship, or any of "them, or by the ship's husband or manager). * * *

"Also that this contract shall be governed by British law, "with reference to which law this contract is made.

"And, finally, in accepting this bill of lading, the shipper, "owner and consignee of the goods, and the holder of the bill "of lading, agree to be bound by all of its stipulations, excep-"tions and conditions, whether written or printed, as fully as "if they were all signed by such shipper, owner, consignee or "holder."

Exh. A, pp. 136, 137.

The libel was based upon the bill of lading (*Libel, fol. 7*), and upon an allegation that

"On or about October 31, 1891, the said vessel, having encountered some rough weather, the master and crew of said vessel became panic-stricken and drove overboard 126 head of cattle. The said vessel did not incur any extraordinary or unusual stress of weather, and the act of said master and crew in driving overboard said cattle was wholly unnecessary, and the loss of said cattle was due to the incompetency and lack of skill of the master and crew" *(Libel, p. 2)*

The libel further alleged that the libellants the Reliance Marine Insurance Company, Limited, of Liverpool, had made insurance upon the cattle for W. W. Brauer & Co. against perils of the seas, jettisons, barratry of the master and mariners, and had paid the insurance on the one hundred and twenty-six head of cattle lost *(Libel, p. 2)*.

The answer filed by the respondent denied the allegations of the libel respecting the circumstances under which the cattle were lost, and averred that

"The loss of said cattle was due to the perils of the sea encountered upon the said voyage, which broke certain of the cattle houses and set the cattle adrift, and that during the continuance of the perils, and by reason thereof, certain of the cattle were washed overboard and others were thrown about the deck, bruised and with broken limbs, and reduced to a dead, dying or hopeless condition, and that upon such being taken to the gangways they were washed over by the seas, which were at the time so raging that one of the seamen of the steamer was washed from the deck into the sea" *(Answer, p. 5)*.

The answer further averred that:

"The care given to said cattle was according to the best judgment of the master of said steamer, and if he erred in his judgment or was in any degree negligent, which the respondent denies, that still this respondent is absolved from accountability and responsibility by reason of the terms of the bill of lading; and also that, by the law as administered in the Courts of Great Britain, the respondent, being itself without fault, is validly, under the terms of the said contract and bill of lading, absolved from all responsibility for any negligent or improper act or conduct on the part of the master, mariners or other servants of the respondent" *(Answer, p. 5)*.

The answer specially set up the terms and conditions of the bill of lading and claimed the benefits of its exemptions, and averred :

" That the contract should be construed and governed by " the law as administered in the Courts of Great Britain, with " reference to which law the contract was stated to be and was " made " (*Answer, p. 5*).

The *Hugo* was an iron steamer, of the highest class, and in good condition. Her length was 375 feet ; her beam 36 feet, and her depth of hold about 30 feet.

Under the contract the stalls for the cattle were to be erected by the ship. They were of the usual style and were properly constructed. As to this, there is no dispute (*Edwards, p. 77*).

The cattle were in charge of two drovers, Joyce and Edwards, with four assistants.

On the 30th of October the vessel met a storm, which continued until November 2d. During the continuance of the storm the steamer lay hove-to for thirty-six hours. When the storm was over one hundred and twenty-six cattle had been lost.

The proofs upon the trial were in serious conflict. The libellants presented proofs to show that the master was negligent in the navigation of his vessel, and that the loss of the cattle was due to that cause. They also presented proofs to show that the cattle had been driven overboard under the orders of the master of the steamer.

The respondent presented proofs to sustain the allegations of its answer.

The log of the steamer showed that in the afternoon of October 30th a heavy storm was encountered, as a result of which one hundred and twenty-six of the beasts perished, being killed or fatally maimed by the perils encountered, or swept overboard by the seas when the gangways were opened to clear the decks of the dead cattle. The log is printed at pages 138, 139 and 140 of the record.

It was provided by stipulation that the English judicial decisions, as contained in the printed reports of Law or Admiralty Courts, might be referred to by either party as evidence of the English common or maritime law as administered in the English Courts (*Stipulation, p. 130*).

The District Court held that, by the perils encountered, some of the cattle were fatally wounded or maimed and that others were cast overboard, or negligently suffered to go overboard, without any effort being made to separate the sound from the maimed *(Opinion, p. 155)*.

The District Court further held that the exemptions of the bill of lading, which provided that the cattle should be at owners' risk, and that the steamer should not be held accountable for accident to or mortality of the animals, or for any accidents of navigation, even when occasioned by the negligence, default or error in judgment of the master, were invalid as against the public policy of this country, and that the further stipulation substituting the British law for the law of the United States was likewise invalid *(Opinion, p. 155)*.

A decree was accordingly made in favor of the libellants for such of the cattle as were either in sound condition or not fatally wounded or maimed at the time they were cast overboard, or negligently or designedly suffered to go overboard through the open gangways on the morning of November 1st, and on the evening of the night previous *(Interlocutory Decree, p. 156)*.

The Commissioner, to whom reference was had to assess damages, reported :

" I am satisfied that much the greater portion of the 126 " cattle were set loose by the storm and thrown and rolled " about the deck during Saturday night and Sunday, and that " at least half of all that were lost were either dead or fatally " wounded or maimed and in a hopeless condition when they " were carried overboard. * * * My conclusion from the " whole evidence is in favor of probability that the proportions " between the dead and the fatally wounded, on the one hand, " and those that were alive and not fatally maimed or wounded, " on the other, are about equal " *(Report, Record, p. 179)*.

and he accordingly reported against the respondent for the loss of sixty-three cattle.

The report of the Commissioner was confirmed by the District Court as to the number of cattle for which the steamer was held liable, and a decree was accordingly entered *(Opinion and Decree, pp. 183, 184)*.

Both parties appealed to the United States Circuit Court of

Appeals for the Second Judicial Circuit, and on March 5, 1894, a decision was filed by a majority of the Court holding that the decree of the District Court should be affirmed.

The majority of the Court state:

"The reason for throwing both sound and maimed cattle over-
"board was a great dissatisfaction with the existing state of
"the decks, an apprehension that the state of things would
"continue, and a determination to put an end to trouble from
"cattle."

Opinion, p. 193.

The majority further held in regard to the sixty-three cattle for which the steamer was held liable that they were lost through

"an entire clearance of the decks without apparent necessity and
"without an effort to discriminate or save any, and that there
"was no pretense that it was to save the ship or the cargo, or
"that it was necessary to sacrifice the animals for the benefit of
"the survivors" (*Opinion, p. 194*).

And that

"The act of the master was not the result of an opinion that
"the drowning of the sound cattle was called for by pruden-
"tial consideration for the ultimate safety of the lives or the
"property in his charge" (*Opinion, p. 195*).

The majority of the Court also held that the English authorities cited to establish the British law did not control the case (*Opinion, pp. 194, 195*).

JUDGE WALLACE dissented from the opinion held by the majority, and said:

"I agree with the Commissioner when he says 'I do not
"'doubt the entire good faith of the master, and that he would
"'gladly have saved the other cattle, as well as the thirty-nine
"'that remained on board.' * * * I think a prudent re-
"gard for the safety of the ship and crew, in view of the sit-
"uation as it was at the time, justified him in clearing the deck
"of the mass of dead and wounded cattle, and that it is idle to
"say that there was any practicable opportunity upon that
"storm-swept deck to separate the dead cattle from the
"wounded and dangerous live ones. After the event, and with
"the wisdom which comes from retrospect, it is not difficult to
"conjecture in case of disaster what might have been done
"that was not done; but I am satisfied from the proofs that the
"master did everything which a prudent and honest navigator

" would have done under the circumstances from the time he " hove-to his vessel until the hurricane was over, and that the " loss of the cattle was caused by perils of the sea, and there- " fore within one of the excepted risks of the bill of lading." (*Opinion, p. 196*).

The majority further held that while the injury to and drowning of the maimed animals were caused by perils of the sea, the non-delivery of the sound cattle was not caused by perils of the sea or by accidents of navigation, or by circumstances properly incident to navigation (*Opinion, p. 195*).

The Court thereupon ordered that the decree appealed from be affirmed, and that a mandate issue accordingly (*Order, pp. 196, 197*).

POINTS.

First.

THE ACTION IS PROSECUTED IN THE COURTS OF THE UNITED STATES IN ATTEMPTED EVASION OF THE AGREEMENT " THAT THE " CONTRACT SHALL BE GOVERNED BY BRITISH LAW."

The libellants, attracted apparently by the decision in the case of the *Brantford City* (*29 Fed. Rep. 373*) have sought to build a similar case against the respondent, and have come far out of their way to bring suit in the same jurisdiction.

Liverpool was the port of destination. It was there that the Insurance Company, the principal libellant herein, and the only libellant that profits by the decree, had its principal offices, and it was there that the claim should have been presented and pressed, if presented and pressed at all.

Apparently no claim was presented there. But six months later the Insurance Company came to New York and instituted this suit.

They did not even have the excuse of coming here to enforce a lien upon the *Hugo*. The *Hugo* was not here. Jurisdiction over the respondent was obtained by attaching the steamer *Enrique* (*Libel Art. 8, p. 3*).

The libel alleged as the only incriminating facts :

" The said vessel having encountered some rough weather " the master and crew of said vessel became panic-stricken, " and drove overboard one hundred and twenty-six head of " cattle " (*Libel, Art. 2, p. 2*).

It alleged as the sole ground of fault :

" The act of said master and crew in driving overboard said " cattle was wholly unnecessary, and the loss of such cattle " was due to the incompetency and lack of skill of the master " and crew " *(Libel, Art. 2, p. 2).*

When the proofs, however, established remarkable perils, the libellants sought to change their ground upon the testimony of an expert that the master was in fault for not avoiding the storm, the witness having a theory that the master could, by change of course, have gone around the storm (*Hannah, p. 93*). This theory was soon practically abandoned.

Then the libellants shifted their ground once more, and made a third contention that though the storm was a severe one, and though the steamer could not avoid it, still she might have lessened its effect by taking the wind and sea on her bow, and heading into the storm (*Barclay, pp. 113, 114*). This contention will be considered later in its proper place.

Second.

THE LIBELLANTS DID NOT MAKE PROPER PROVISION FOR THE CATTLE.

By the terms of the contract the steamer was to supply space, stalls, water for the cattle and free transportation for the drovers in charge, not exceeding one man for every thirty cattle. The stalls were to be put up at the expense of the steamer to the satisfaction of the shippers, who agreed to assume all responsibility. There is no dispute that the stalls were properly constructed *(Edwards, p. 77).*

The shippers sent six men with their cattle. Only two of these men have been produced as witnesses. Joyce, who was the foreman, "was sick, very sick; he was useless for the work, "and did not want to perform any work during the trip" *(Gartiez, p. 47)*.

"He had consumption and you can examine him with the "doctors in case you have any doubt.

"Q. Wasn't he an efficient cattleman? A. No.

"Q. This was the foreman? A. Foreman.

"Q. Were the other cattlemen efficient? A. There were "three Jews, one German and an Irishman, and the three "Jews were worthless. Besides, they were lazy and did not "want to work. When I went to force one of them to work, "he came forward and made faces at me so that I should not "make him work" *(Gartiez, pp. 47, 48)*.

Gartiez' testimony as to Joyce's condition was confirmed by the fact that Joyce, when examined some months later, was found to be dying of consumption in a Baltimore hospital, and he himself complained of the men put under his charge, stating that he had some men that he could not trust; that he had "two cheap men, Jews" that he could not trust *(Joyce, p. 67)*.

The respondent's witnesses claimed that from the morning of October 31st to the morning of November 2d, no cattlemen were seen on deck *(Gartiez, pp. 43, 44, 47)*.

The master testified that he himself went on November 2d and compelled the foreman to get up and to get men to attend to and feed the cattle that remained alive *(Gartiez, p. 47)*.

Other witnesses confirmed captain Gartiez's statement that the cattlemen were not on deck during the two days of the storm *(Zaldegui, pp. 12, 15; Ormaechea, pp. 27, 30)*.

The men admitted that they made no effort to save or relieve the cattle *(Edwards, p. 79)*.

The District Judge summarized the men as "inefficient" *(Opinion, p. 147)*.

So conspicuously did the cattlemen abandon their posts and leave the burden of caring for the cattle upon the seamen, that the seamen claimed wages for performing the duties of the cattlemen *(Zaldegui, pp. 19, 20)*.

Third.

THE STORM ENCOUNTERED BY THE HUGO WAS ONE OF NOTABLE SEVERITY, AND THE LOSSES OF THE CATTLE WERE DUE TO THE PERILS INCIDENT TO THE STORM.

The undisputed fact that the *Hugo* was hove to for thirty-six hours indicates that there was no common peril (*Mudie, pp. 8, 9; Ex. C, pp. 138-140; Ex. D, pp. 139-143*).

The storm began Friday afternoon, October 30th, when a heavy sea destroyed the cattle houses on the port side, opposite hatches No. 4 and No. 3. Efforts were made to restore the pens, they were again broken by the seas and the cattle remained in the alleyways for the night (*Exh. C, p. 138*).

In the morning the stalls were rebuilt and the cattle were replaced, with the exception of one bullock, on hatch No. 5. The steamer was stopped for this operation (*Log, Exh. C, p. 138; Ormaechea, p. 28; Gartiez, p. 39*).

In the afternoon of Saturday, October 31, the wind came from the north northeast; heavy seas were running from the northeast, which had been the previous direction of the wind; the heavens were dark and the waves high, and at two o'clock some of the houses opposite No. 4 hatch were destroyed, and the oxen were loose. The engine was then stopped and the vessel hove to (*Log, Ex. C., p. 138; Ormaechea, p. 18; Gartiez, pp. 40, 41*). The pens had been broken, and the cattle "went "wherever they could go, escaping" (*Gartiez, p. 41*).

The master tried to arrange for placing the cattle in their houses; but it was not possible to do so. "and they came "through wherever there was room, and agglomerated them-"selves on the starboard side" (*Gartiez, p. 41*).

Later in the afternoon a gangway was opened on the starboard side opposite hatch No. 4. This was the very point at which the stalls had already sustained injury through the seas, and from which cattle had escaped.

While, undoubtedly, it would have been necessary, in order to open this gangway, to remove certain pens (unless the pens had already been destroyed by the waves), there is no proof whatever that any pens were torn down in which cattle were still standing, in order to reach that gangway.

The pens opposite that gangway on the port side of the vessel were those that had already sustained damage, and the cattle that had occupied those pens were loose on the deck; and the proofs are that the pens on the starboard side opposite gangway No. 4 had also been wrecked (*Ormaechea, p. 27; Gartiez, pp. 38, 39; Zaldegui, pp. 12, 16*). Zaldegui says the entire pen was down and the pieces carried clean across the ship. The posts were down and everything *(Zaldegui, p. 16)*.

On that afternoon, when gangway No. 4 was opened, some nine or ten cattle went out into the sea. They were the cattle from the wrecked pens. These cattle, when they went into the sea, were already "maimed and helpless" *(Opinion, District Judge, p. 145)*.

With a hurricane raging, with the cattlemen "inefficient," with the crew occupied in the care of their vessel, with the steamer shipping heavy seas upon her deck, with the pens in a more or less damaged condition, the master was called upon to contemplate the perils of approaching night and to determine the best method of meeting them.

He says:

"I convinced myself that I had tremendous weather, and "that I was to have a hurricane that night.

"Q. And then you opened the gangway? A. Towards "nightfall I opened the gangway of No. 4 hatch.

"Q. On the starboard side? A. On the starboard side, "and when it was opened some of the cattle went overboard. "On that same night, or rather this same afternoon, I opened "the gangways on the port and starboard side opposite the "deck house, because I supposed that in the horrible hurricane "that we would have during the night the waves would break "the cattle out of their places on the port and starboard bows "and carry them down to the alleyways where there was no re-"source for their safety. And as I thought, opening this dur-"ing the night, without my seeing them, but as I had ex-"pected, the cattle washed down; the waves broke the houses "and washed them down" *(Gartiez, pp. 41, 42)*.

All through that horrible night the master stood watch. Oil bags were placed in the water in an effort to calm the waves. When day broke on the morning of November 1st the tempest was still raging, and its cruel effects were seen upon the deck of the steamer.

The witness testifies as follows:

"When daylight appeared, I saw from here to here" (indicating the places where the stalls are on the starboard side)—"I saw there from the bridge, looking over myself, that many of the cattle had their legs sticking out the sides of the vessel through the rail—some one leg, others two legs, and others with all four. This must have happened without doubt during the night. * * * As I have said before, a great many of the cattle had their legs outside of the rail; the houses were broken—a few were not broken on the forward part of the ship; the cattle were all down, with the exception of those toward the bow, and some were dead, others broken, others with their horns broken off; some were on their backs, making a heap of cattle and boards all mixed in one. When I saw this condition of affairs, the first officer came to the bridge, where I had been all night, and I asked him his advice as to what to do in this situation. He says to me, 'The weather is too strong, the sea becomes more crested, 'the heavens still more threatening.'

"Q. How was the barometer? A. I then went to see the barometer, and during that time it was falling very rapidly. I expected that the hurricane would come with still much greater force.

"Q. Had waves been breaking over the vessel during this time? A. The waves would break on the deck, over the bridge, over the houses that had already been broken, and there was water everywheres. And there we could see a calamity. The opinion of the first officer and my own opinion, after having looked at the weather and the barometer, was to determine to open gangway No. 3.

"Q. About what time in the morning of November 1st was this? A. About 6 or 7 o'clock—just about daylight.

"Q. And then you opened gangway No. 3? A. Gangway No. 3 was opened. * * * We breathed happy when we saw it open.

"Q. Were the waves still washing over the ship? A. Yes, sir; and as soon as I opened the gangway all of that portion of the deck was cleared off, as they were all in a pile—all the oxen" *(Gartiez, pp. 42, 43).*

The first officer states that when morning came "the whole after part of the deck was a scene of destruction" *(Ormaechea, p. 29).* And when asked whether the crew breakfasted that morning, he replied:

"If a file of soldiers were put before you with their muskets pointed at you, would you feel like eating? With an out-and-out hurricane in the morning, all the after-deck a com-

" plete scene of destruction, all the oxen thrown from port to " starboard side, back and forth; such of the pens as remained " standing had only the roofs, and the sideboards had been " carried away and broken; all the flooring boards to which " the houses had been made fast were loose; during the night " all that had been opposite No. 4 hatch had been carried " away, and you would find the cattle, some with legs broken " and others dead; and, in view of all this, would you feel like " eating breakfast?" (*Ormaechea, p. 30*).

The seas were running from three different directions:

" Sometimes we had the seas from the north, and sometimes " from the northwest, and from the northeast—in three or four " directions" (*Ormaechea, p. 32*).

One seaman was caught by a wave and carried into the sea (*Enchortiata, p. 34*).

The boatswain says:

" It was a regular hurricane all night, and the engines " stopped" (*Zaldegui, p. 14*).

" The houses that we had repaired had broken immedi- " ately after, and the cattle thrown around, some laying down, " and some with broken legs, and getting along as best they " could" (*Zaldegui, p. 12*).

" Q. Did you sleep that night? A. Nobody.

" Q. Did you look at the cattle next morning? A. Yes, " sir; the decks was a regular slaughter house; all the cattle " houses were broken.

" Q. What was the condition of the cattle? A. The main " portion of them were dead, and a great many more with " broken legs; and some were alive from hatch No. 2 forward" (*Zaldegui, p. 14*).

" Q. How was the sea at this time? A. It was so heavy " that we could hardly look at it; it was breaking from one " side to the other" (*Zaldegui, p. 14*).

The carpenter says:

" Everything was broken and destroyed with the ex- " ception of a few houses on the forward part of the " vessel. Everything was destroyed in pieces from about here " (indicating No. 2 hatch) aft, from about No. 2, and No. 3 for- " ward.

" Q. Describe the condition of the cattle more fully. A. " Some were laying on their sides, others were dead, and others " were wounded.

"Q. How wounded? A. Some had their horns broken "and others were bruised by the general shaking up that they "had had with the tossing back and forth of the waves" (*Echevarria, p. 23*).

Against the graphic descriptions of these witnesses only two witnesses have been called by the libellants.

These men say that it was not blowing hard and that "it was not very rough" (*Edwards, pp. 70, 71*).

There was no "bad weather" (*Joyce, p. 52*).

"It was kind of squally" (*Joyce, p. 57*).

Joyce says:

"We got in the tail-end of a storm; blowing a little" (*Joyce, p. 51*).

The utter unreliability of the men is shown by their inaccuracy respecting matters concerning which there can be no dispute.

Edwards says it blew hard only eight hours (*p. 70*); that the steamer was hove to only twelve hours (*p. 70*), though she was unquestionably hove to for thirty-six hours.

He testifies that the cattle were driven overboard early Saturday morning (*Edwards, pp. 70, 71*), though it was not until Saturday afternoon that any gangways were opened, and it was during Saturday night and Sunday morning, November 1st, that the great proportion of the cattle went overboard. He says that the cattle were driven overboard from the port side, and that that was the lee side (*p. 72*); though there can be no question that the starboard side was the lee side, and that the cattle went over the starboard side.

He states that the number that went overboard was 165; whereas, it was only 126 (*Edwards, p. 75*).

He says the wind was N. N. W., and the seas not very bad (*Edwards, p. 76*); whereas the wind was N. N. E.

He says that the cattle were driven overboard either Friday or Saturday (*Edwards, p. 78*). And later he testifies that he does not know whether there was any necessity for driving them over or not (*Edwards, p. 79*).

Joyce states that on Thursday they got into the tail end of a storm which grew worse towards night; that Friday was the same as Thursday, only not quite so bad; that on Saturday it

commenced to get good weather, and that on Sunday "it was very fair, good weather" (*Joyce, pp. 51, 52*). He adds that there was no "bad weather," either Thursday, Friday, Saturday or Sunday (*Joyce, p. 52*).

The indisputable proofs in the case show, however, that the severe weather came on Saturday and Sunday, October 31st and November 1st.

Joyce says that the steamer was hove to for eighteen or twenty hours only (*Joyce, p. 55*); whereas, she was hove to for thirty-six hours.

He summarizes by saying that he would call it "squally weather" (*Joyce, p. 57*).

Fourth.

THE STEAMER WAS INTELLIGENTLY AND PRUDENTLY MANAGED AND NAVIGATED DURING THE STORM.

It seems scarcely necessary to give attention to the theory that the steamer could and should have known exactly when and from what direction the storm was approaching, and could and should have avoided the storm by a change of course.

This theory was one of the refuges sought by the libellants in the excitement of the trial. It was not suggested in their libel, and it was later apparently abandoned; if not formally abandoned, it must be deemed worthless in the face of the testimony produced by the respondent to meet it.

When captain Gartiez' first deposition was taken, the only charge against him was that set forth in the libel, of being "panic-stricken," and his deposition was directed to that point.

When the libellants, upon the trial of the cause, started a new theory, leave was obtained to re-examine captain Gartiez, and his further deposition was taken in New Orleans, in which he amply defends himself against the criticisms of captain Hanna (*Gartiez, pp. 127-130*).

The whole of captain Hanna's theory had been based upon the assumption that the change of the barometer indicates a

storm; a change of barometer indicates rain possibly; but it does not necessarily indicate the approach of wind (*Thompson, pp. 107, 108; Gartiez, p. 128*).

He later says: "I have gone with a high barometer in bad "weather and with a low barometer in good weather" (*Gartiez, p. 128*), meaning by "bad weather" violent winds.

Captain Thompson, of the *Bovic*, the great sister ship of the *Naronic*, and one of the most notable cattle vessels, testifies that such navigation as was suggested by captain Hanna is impracticable (*Thompson, p. 107*), and that there is no custom among navigators of steam vessels to attempt to avoid storms by changes of course (*Thompson, p. 107*).

The libellants, in calling another expert, captain Barclay, were practically compelled to abandon Hanna's theory; but they endeavored to prove by captain Barclay that, either the *Hugo* should have gone off straight before the seas, or, if the seas were too heavy for that, she should then heave to, head to to the sea (*Barclay, pp. 113, 114*).

This witness, however, overlooks the fact that the seas came from different directions, and that there was a heavy sea from the N. W., and another sea from N. and N. N. E. (*Log, p. 138; Gartiez, pp. 127, 129; Ormaechea, p. 27*). He overlooks, too, the build of the steamer. The *Hugo* was a long, slender vessel of only thirty-six feet beam. If she tried to head the seas she would plunge and cut down in them like a knife.

Captain Gartiez says that he could not have put his bow into the wind; that his engines were not powerful enough in that storm to hold her there (*Gartiez, p. 129*), and that, with the cross seas, it would have been impracticable to ho'd the vessel with her bows to one sea without catching the others disastrously.

Captain Thompson, of the *Bovic*, states that captain Gartiez's management was just right; that

> "a ship like the *Hugo*, or any small sized narrow ship, cannot "run off before the seas without the liability of taking a sea "over her stern and sweeping everything" (*Thompson, pp. 106, 107*)

and that it would not be practicable to put her bow to the sea, as "only vessels of high power can do that" (*Thompson, pp.*

105, 106); that the *Hugo* was only "small powered, and she "wouldn't be able to meet a heavy sea" *(Thompson, p. 106)*. He states that the proper procedure for a steamer is to stop her engines and take the sea on the quarter, that then "she is really hove to" *(Thompson, p. 106)*.

He explains that the propellor acts as a drag and holds the stern up to the sea, and that the steamer, for that reason, in heaving to lies just in the opposite way that a sailing ship would lie *(Thompson, p. 106)*.

The heaviest sea was from the N. W. *(Gartiez, p. 127)*; another sea came from N. or N. N. E.

The steamer lay, during the thirty-six hours that she was hove to, heading variously between E. S. E. and S. E. This brought the heavy sea almost astern, and brought the other seas abaft her beam and was the most favorable position possible *(Thompson, pp. 106, 107; Gartiez, p. 129)*.

Captain Barclay, the expert last called in the case by the libellants, admits that the judgment of the master must be the controlling judgment, and is much better than that of witnesses called to criticise.

"Q. Have you ever been, captain, in a serious storm at "sea? A. Yes; a great many.

"Q. And in occasions where you had to exercise your "own judgment as to the best navigation of your vessel? A. "Frequently.

"Q. When you have come ashore have you ever talked "over your experience in those storms with other mariners? "A. Occasionally; not very often.

"Q. And whose opinion would you go by in the matter of "the navigation of a vessel; your own or that of these persons "that you talked with after you came ashore? A. Decidedly "my own.

"Q. The master of a vessel is the only one who can deter-"mine the right thing? A. Yes, of course" *(Barclay, pp. 117, 118)*.

Fifth.

THE OPINION OF THE DISTRICT JUDGE AND THE OPINION DELIVERED BY THE MAJORITY OF THE JUDGES OF THE CIRCUIT COURT OF APPEALS ARE IN ERROR AS TO FACTS.

No witnesses were examined before the District Judge except the agent of the Reliance Marine Insurance Company, two experts, translators, who had conflicting views as to the meaning of certain words in the log, and an expert navigator.

The District Judge quotes at length from captain Gartiez's testimony. The quoted testimony related exclusively to the weather during the night of Saturday, October 31st, and the early morning of Sunday, November first.

The District Judge, after setting out the testimony in full, says:

"Notwithstanding this description of the situation during "Saturday, it is clear from the master's statement, and especi- "ally that of the first officer confirming the statements of the "cattle men, that before the night of the 31st there had been "but little damage to the cattle" *(Opinion, p. 152)*.

He evidently carries the impression that the captain's testimony of the distressed state of the cattle referred to Saturday afternoon and that there was a conflict between the master and the mate as to the condition of the cattle on Saturday afternoon.

The master's testimony, however, relates to apprehensions of the weather impending for the night, and to the severity of such weather during the night and the following morning.

Again the District Judge says:

"The master and first officer intimate that none but dead "animals or those with broken limbs were cast overboard. "The log imports no such restriction, while the testimony of "the boatswain and the carpenter show the contrary. It is "plain that the account given by the master and first officer "cannot be accepted without considerable abatement and "modification" *(Opinion, pp. 152, 153)*.

While the log does not go into details as to the condition of the cattle it describes them as

" some with their legs broken, others dead, with so much suf-
" fering, others with their legs tangled in the rail " (*Log, p. 146*).

and states that in the morning

" we immediately commenced the sad operation of throwing
" over all the cattle that were loose on the decks and in sorry
" plight " (*Log, pp. 146, 147*).

The boatswain and carpenter are naturally, from lack of education, unable to give as accurate descriptions as their superior officers, but there is absolutely nothing in the direct statements of either, or in the omissions of either, to throw discredit upon the testimony of the master and first officer.

The District Judge quotes freely from the boatswain's testimony, and italicises words to indicate that some of the cattle that went overboard were not actually dead.

From the middle of his liberal extracts he omits the boatswain's statement :

" The deck was a regular slaughter house; all the cattle
" houses were broken. Q. What was the condition of the
" cattle? A. The main portion of them were dead, and a
" great many more with broken legs ; and some were alive from
" No. 2 hatch forward " (*Zaldegui, p. 14.*)

Those remaining alive from No. 2 forward were the thirty-eight that survived the storm, and were subsequently delivered in Liverpool.

Another conspicuous error of the District Judge occurs in his statement :

" The carpenter also testifies that the stalls which had been
" broken at No. 4 hatch were repaired about 5 P. M. of Satur-
" day, the 31st, and the cattle put back in their places, and
" that the stalls remained in good order until they were again
" broken some time after " (*Opinion, p. 153*).

He omits to note that the carpenter's testimony that certain stalls were repaired at five P. M. related to the stalls on the " port side " (*Echevarria, p. 25*), whereas the statement that the " stalls remained in good order " related specifically to stalls on the " starboard side " (*Echevarria, p. 25*).

It is to be noticed that Edwards, who was the first witness examined by the libelants, has very little to say about the flooring being disturbed. He testifies explicitly on his examination:

"You see, some of the pens were loose on account of the "water *loosening the flooring* and broke the headboards, and "the sailors cut the ropes" (*Edwards, p. 22*).

After Edwards gave his testimony the witnesses from the steamer were examined in July, 1892. They confirmed Edwards in every particular as to the flooring being disturbed by the storm, and stated that the only floor they removed was that on the top of one of the hatches, to prevent the hatch being crushed in, as the cattle were hurled to and fro (*Zaldegui, pp. 15, 16, 18*).

Some months later the libellants produced Joyce, and then elaborated the theory of the flooring being torn out. But even Joyce admits that on the morning of Saturday, October 31st, the pens were rebuilt and the cleats replaced, which had been broken the night before, and the cattle which had passed the night in the alleyways were put back in the pens (*Joyce, p. 58*).

The report of Commissioner Taft is entitled to special weight in its recital of facts and in the credibility allowed to witnesses from the fact that the cattleman Edwards was produced before him. He saw him, saw how ready he was to rise to any emergency, even to the extent of saying that the cattle at the time they went overboard were in "first-class condition" (*Edwards, pp. 161, 162*).

The Commissioner's report, from pages 170 to 179, is probably as accurate a statement as can be made. It is impossible to read his report without coming to the conclusion that he felt that the master and officers of the *Hugo* performed their full duty during the period of this great distress, and that the statements made by them were consistent and credible.

His conclusion that the ship should be held liable for sixty-three of the cattle, was compelled by the stringent form of the interlocutory decree. That order compelled him to report the number of the cattle that were in his opinion not fatally wounded

or maimed at the time when the houses on the starboard side were broken up.

The proctors for the libellants argued strenuously before the Commissioner that, under the terms of that order, he was bound to report in their favor for the entire number of cattle lost.

This contention he did not sustain; but the constraint under which he acted by reason of the terms of the interlocutory decree are indicated throughout his opinion.

He reports:

"It was argued before me by respondent's counsel that, so "far as any cattle that were not fatally wounded or maimed "may have gone overboard, it was a necessary incident to "clearing the deck of the wrecked and ruined cattle, and ought "not to be ascribed either to negligence or design on the part "of the master" *(p. 174)*.

This very reasonable and moderate plea was overruled by the Commissioner, who said:

"This view appears to me to conflict too directly with the "decree of the Court to admit of being entertained by me" *(p. 174)*.

He even feels constrained to hold that, as to the cattle that went out through some of the open gangways during the night at the time when the waves were rolling over the vessel and the darkness prevented any one's seeing what occurred, "must be "regarded as 'designedly suffered' to go overboard" *(p. 173)*.

The Commissioner does not report that any cattle were "driven overboard." His report relates only to those "suf-"fered" to go overboard *(Report, p. 174, fols. 908, 939)*, under the construction of the interlocutory decree which he felt constrained to adopt.

The Circuit Court of Appeals, after reviewing the opinions of the District Judge and of the Commissioner, make their conclusions as follows:

"The fact that the flooring and cleats were taken up so "that the cattle might have no foothold during the night but "were carried down to the gangway by the rolling of the ship, "is significant that the captain wanted to expedite the de-"livery of the cattle into the ocean. He wanted this not for

" the safety of the ship, or to end the sufferings of the maimed " cattle. The preparations were made so that the sound as " well as maimed cattle could be washed overboard. Whether " during the night sound cattle were actually washed overboard " cannot be known with certainty. On Sunday morning the " testimony makes it apparent that the master determined to " rid the ship of every head of cattle except those under the " turtle-back. He intended to clear the decks of cattle whether " well or injured, and no effort was made 'to separate the " 'sound from the maimed.' The cattle not injured were " pushed or prodded and driven across the slippery iron deck, " and were hurried over the gangways as rapidly as possible " and in a short space of time. 'No attempt was made to dis- " 'criminate or to save any,' because the master and the crew " wanted none saved. We concur with the District Judge in " the conclusion that there was 'no reasonable or apparent " 'necessity' for the non-existence of an attempt to separate " the two classes. There was a storm, but nothing belonging " to the ship was injured. No one testifies that anything was " loosened or unshipped or that there was any leakage, and no " one claims that she was in pressing peril. The sacrifice was " not to save the vessel or her cargo, but the presence of the " cattle during the storm was a great inconvenience and there " was, as found by the District Judge, an apprehension that " the storm would continue, and that the existing inconveni- " ence would be increased. The reason for throwing both " sound and maimed cattle overboard was a great dissatisfac- " tion with the existing state of the decks, an apprehension " that the same state of things would continue, and a de- " termination to put an end to trouble from cattle." (*Opinion, p. 193*).

The citations already made indicate the errors of the Circuit Court of Appeals in respect to the removal of the floors and cleats (*supra pp. 21, 22*).

The gravamen of the decision of the majority of the Circuit Court of Appeals is in the alleged failure of the master to separate the sound cattle from the maimed.

The proofs establish that efforts to preserve the cattle were made as long as efforts were in any way reasonable or practicable.

On Friday afternoon, a heavy sea destroyed cattle houses on the port side opposite hatches No. 4 and No. 3. Though efforts were made to restore the pens, they were broken down again

by the seas, and the cattle remained in the alleyways for the night.

In the morning the cattle were restored to the pens, the steamer being stopped, that the work of reconstructing pens might be performed.

At two o'clock Saturday afternoon some of the houses opposite No. 4 hatch were again destroyed, and the oxen were loose on the deck.

The master testifies that at this time, he endeavored to place the cattle in their houses; but that it was impossible to do so (*Gartiez, p. 41*). And in this he is not contradicted by the cattlemen, and as the Commissioner finds:

> " Nor do I see that the cattlemen showed any disposition " to try to do so or to seek to have it done " (*Commissioner's Report, p. 172*).

Night was then approaching, the storm was increasing, the cattlemen were "inefficient", the perils of the night were rightly apprehended by the master, and he made provision for the inevitable disasters that were impending by opening certain of the gangways.

The opening of these gangways could do no injury. So long as the cattle were in their pens, the fact that the gangway was open did not imperil them; but, in the event of their pens being broken and the cattle being loose, the open gangways afforded a means of relieving the ship of the dangerous presence of the wrecked beasts.

The terrible condition of the decks on the morning of November 1st has already been described in the language of the witnesses. All the pens from the No. 2 hatch aft were wrecked, and the deck was like a " slaughter-house." Among the maimed cattle there may have been some that had not received absolutely fatal injuries. But with the storm then raging and threatening to become worse, we submit that the Judges below had no right to impose upon the master the duty of separating " the sound from the maimed " (*Opinion, p. 155*). Such a requirement goes beyond the bounds of the practicable.

No man on board the *Hugo* thought of such a thing. Not one of the cattlemen suggested it, and we submit, very respectfully, that the laying down by the District Judge and by the majority of the Circuit Judges of such a rule indicates clearly

that they have not realized, or begun to realize, the situation of a vessel at sea in a hurricane.

Who was to determine whether a beast was sound or injured? How was such person to measure the extent of the injuries? Was he bound to go among the struggling beasts on a wave-swept deck?

Upon this point, which was apparently deemed the controlling point in the Circuit Court of Appeals, Judge WALLACE dissents, saying:

"I do not think that the master sacrificed the uninjured "cattle simply for the sake of the comfort and convenience of "the ship. I agree with the Commissioner when he says 'I do "'not doubt the entire good faith of the master, and that he "'would gladly have saved the other cattle as well as the "'thirty-nine that remained on board.' The theory of the "libel is that the master and crew of the vessel became 'panic-"'stricken' and drove the cattle overboard; and the evidence "more nearly supports this theory than the one which has "been adopted. I think a prudent regard for the safety of the "ship and crew in view of the situation as it was at the time, "justified him in clearing the deck of the mass of dead and "wounded cattle, and that *it is idle to say that there was any "practicable opportunity upon that storm-swept deck to sep-"arate the dead cattle from the wounded and dangerous live "ones.* After the event, and with the wisdom which comes "from retrospect, it is not difficult to conjecture, in case of "disaster, what might have been done that was not done, but "I am satisfied from the proofs that the master did everything "which a prudent and honest navigator would have done "under the circumstances from the time he hove to his "vessel until the hurricane was over, and that the loss of the "cattle was caused by perils of the sea, and, therefore, within "one of the accepted risks of the bill of lading." (*Opinion, p. 196*).

We urge that it cannot be held that a single sound beast, or a beast with any commercial value, was lost *negligently*. Possibly some were not dead, and it is within the range of possibility that some of them might have lived until they reached Liverpool, for the officers admit that certain beasts were on their feet, and ran forward through the gangway. But the loss of those that went through the gangway was not a *negligent loss;* it was a loss incident to the gangways being open; open, that the vessel might be freed from the dead and wrecked cattle.

The maimed and wounded cattle were commercially worthless. This is proved by the fact that the only one of the maimed cattle that did not go overboard through the open gangways died before it reached Liverpool.

Edwards says that one of the cattle that was originally in the after part of the vessel "happened to be a little wilder than "the others, and he run in amongst these that were in the "whaleback forward" (*Edwards, p. 75*), and that that animal "died as the result of the knocking about" it had received (*Edwards, p. 75*).

The respondent's witnesses testified as follows respecting the condition of the cattle : Zaldegui says that not one of the cattle could have lived ; "that they were all badly injured" (*p. 15*).

Echevarria says : "They could not have lived, because they "were all destroyed" (*p. 24*).

The first officer says : "My opinion is that after having "suffered so much I do not think they could have lived" (*Ormaechea, p. 31*). And he refers to the one that remained injured and wounded on board, and that died a few days later.

The master, captain Gartiez, had carried cattle as cargo for thirteen years. In 1887 he had lost twelve cattle—carried away by the sea—and he had had no other accident during his whole experience (*Gartiez, p. 43*).

He says, in respect to the cattle on the *Hugo :*

"Those oxen were too much damaged to have been saved, "because those that lay on their backs, with their feet and legs "in the air, it was impossible to save them" (*Gartiez, p. 43*).

Upon the reference before the Commissioner, Edwards admitted that, under the regulations of Liverpool, where the cattle where bound, no maimed or sick cattle are permitted to be landed (*Edwards,p. 166*).

Sixth.

THE FACT THAT THE LOSS WAS A LARGE ONE DOES NOT CARRY ANY PRESUMPTION THAT IT WAS A NEGLIGENT LOSS.

The agent of the Reliance Marine Insurance Company, one of the libellants, testifies to insurances made by his Company upon cattle between October 19th and November 8th *(p. 100)*, and shows that out of nine steamers so insured only two had material losses, the *Hugo* losing 127 and the *Alsatia* 75 (*Despard, p. 101*). The large loss of the *Alsatia* was accounted for by saying that her fitness as a cattle vessel was "not very good" (*Despard, p. 102*), explaining that for a cattle vessel the dimensions are important, and that although the *Alsatia* had a general rating of 100 A1, the highest rating, she was not a very good cattle vessel because of her narrow beam; her beam being "under forty feet, I think thirty-seven" (*Despard, pp. 103, 104*).

The *Hugo*, though also holding the rating 100 A1, was of even narrower beam than the *Alsatia*, the *Hugo's* beam being only thirty-six feet (*Gartiez, p. 37*).

A long list of vessels carrying cattle to Liverpool from Boston, New York, Montreal, Baltimore and Norfolk during the latter part of October and the early part of November 1893 was put in evidence (*Exh. 3, pp. 134, 135*).

The exhibit shows that at least one vessel sustained a heavier loss than the *Hugo*.

The *Venetian*, sailing from Boston, October 20th, four days before the *Hugo* sailed from New York, lost 188 cattle (*Exh. 3, p. 135*).

The *Alsatia*, which sailed five days later than the *Hugo*, lost 75.

The *Baltimore* lost 51.

The *St. Pancras* lost 30.

These figures show that losses of cattle are *incident to the business* of transporting live cattle at sea. They are losses that the libellant Insurance Company should be content to bear.

Captain Gartiez had carried cattle for thirteen years and, aside from twelve cattle lost in 1887 swept off by a sea, he had

no other accident than on this unfortunate voyage (*Gartiez, p. 43*). The percentage of cattle lost by captain Gartiez during his long experience is far smaller than the percentage of loss upon the fleet of steamers all taken together, sailing in October and November 1891 (*Exh. 3, pp. 134, 135*).

The only allegation of fact made in the libel, to-wit: "the "master and crew of the vessel became panic-sticken and "drove overboard one hundred and twenty-six head of cattle", is disproved.

No live cattle were thrown overboard with a single exception (*Zaldegui, p. 17*).

Ormaechea says there was one that was thrown over (*Ormaechea, p. 32*). This one, he says, "was one that had lain "on No. 3 hatch, and was nearly dead, with his tongue stick-"ing out, and was the only one we threw overboard" (*Ormaechea, p. 32*).

This one he refers to earlier (*Ormaechea, p. 28*) as being injured by being jammed during the night of the 30th between the donkey engine and the corner of the passage, the houses having been broken the day before, and certain of the cattle passing the night in the alleyways. It is the throwing of this bullock over, in its perishing condition, that affords the sole foundation for the stories of the two cattlemen. They deal in generalities with much volubility, but when they are asked to give an instance of live cattle being thrown over, they can only call to mind "the white bullock" that lay on the hatch and that couldn't rise (*Joyce, pp. 54-56*).

The Commissioner does not report that a single live beast was thrown or driven overboard (*Commissioner's Report, pp. 170-180*).

Seventh.

THE LAW OF GREAT BRITAIN SHOULD BE APPLIED TO THE CONSTRUCTION OF THE CONTRACT AS SET FORTH IN THE BILL OF LADING, AND THE COURTS HAVE ERRED IN OMITTING TO APPLY SUCH LAW.

In the bill of lading the following provisions are found:

"This contract shall be governed by the British law, with "reference to which law this contract is made.

"Finally, in accepting this bill of lading, the shipper, owner "and consignee of the goods, and the owner of the bill of lad- "ing, agree to be bound by all its stipulations, exceptions and "conditions, whether written or printed, as fully as if they were "all signed by such shipper, owner, consignee or holder" *(Exhibit A, p. 137).*

On October 10, 1891, two weeks before the bill of lading was issued, a contract had been made for the shipment of cattle "on the upper deck." That contract provided that this very bill of lading should be used *(Exhibit 2, p. 133)*, and specifically provided that the shipper "assumed all risks of mortality or accident, however caused, throughout the voyage" *(Exhibit 2, p. 132).*

In a recent case, it was held by this Court that a similar preliminary contract was a mere memorandum between the parties, and that the relations of the parties were to be governed by the provisions of the bill of lading.

The Caledonia, 157 U. S., 124, 139.

In the case now under consideration there can be still less question that the bill of lading is the controlling contract for the reason that the preliminary contract provided in terms for this form of bill of lading, and the bill of lading was subsequently accepted by the shipper as being strictly in line with the preliminary contract. So far from being objected to or protested against in any way by the libellants, they founded their libel upon it *(Libel, Art. 1, p. 2).*

It is fair to say, therefore, that the parties deliberately chose to submit the question of responsibility under the contract to the law of Great Britain.

In the case of the *Montana* this Court held:

"The review of the principal cases demonstrates that "according to the great preponderance, if not the uniform con- "currence, of authority, the general rule that the nature, the "obligation and the interpretation of a contract are to be gov- "erned by the law of the place where it is made, unless the "parties at the time of making it have some other law in view, "requires a contract of affreightment made in one country "between citizens or residents thereof, and the performance of "which begins there, to be governed by the law of that country, "unless the parties, when entering into the contract, clearly "manifest a mutual intention that it shall be governed by the "law of some other country.

"There does not appear to us to be anything in either of "the bills of lading in the present case tending to show that "the contracting parties looked to the law of England, or to "any other law than that of the place where the contract was "made."

Liv. & G. W. Steam Co. vs. Phenix Ins. Co., 129 U. S., 397, 458.

The Court held in that case that there was nothing to indicate that the contracting parties looked to any other law than the law of the United States.

In the case under consideration, however, it is apparent that the parties *did* look to the law of England; that they deliberately chose it; that it was not an exaction from a shipper by a carrier, but that it was in accord with a preliminary contract, freely made and unobjected to.

The cattle were destined to an English port. It was fitting that reference should be made to the law of that port. Any differences between shippers and ship-owners would naturally be submitted to the law of the place where their relations terminated.

Moreover, the Reliance Marine Insurance Company (Limited), which represents the entire interest of the libellants (*Libel, pp. 1, 2; Assignment Exh. 1, p. 131*), is a British corporation having its principal office in Liverpool, the port of the *Hugo's* destination.

The validity of the provisions of the bill of lading should be determined by the standard of what is "just and reasonable in the eye of the law."

Railroad Company vs. Lockwood, 17 Wallace 357, 380, 382.

It is just and reasonable to apply the British law—the law of the port of destination.

Proof of the English law was made under a stipulation, which provided:

"It is hereby stipulated that the English judicial decisions, as contained in the printed reports of the Law or Admiralty Courts, may be referred to by either party as evidence of the English common or maritime law as administered in the English Courts" (*Stipulation, p. 130*).

The following cases were cited by the petitioner in the District Court and in the United States Circuit Court of Appeals:

The Duero, L. R., 2 Ad. & Ecc., 393 (1869).
Grill vs. General Iron & Screw Collier Co., L. R., 1 C. P., 600 (1866).
The Cressington, L. R., 1 Prob., 152 (1891).
Burton vs. English, L. R., 12 Q. B. Div., 218 (1883)

(*Record, fol. 247*).

The application of these cases respectively to the several exemption clauses of the bill of lading will be hereafter considered.

The District Judge declined to enforce the English law, upon the ground that the stipulation in the bill of lading providing for the application of the British law was invalid as against the public policy of the United States (*Record, p. 155*).

A similar provision has, however, been sustained in the District Court of Maryland.

The Oranmore, 24 Fed. Rep., 922, 927.

The United States Circuit Court of Appeals avoided any discussion of the application of the British law, disregarding certain of the exemption clauses, and holding in respect to others that the facts did not render the question of applying the British law material (*Opinion, pp. 194, 195*).

The case of *Oscanyan vs. Arms Co., 103 U. S., 261*, which has been cited in opposition, is not pertinent, for the reason that the suit was founded on a *turpis causa*, arising and performed wholly within the United States; nor is the case of

Rousillon vs. Rousillon, L. R. 14, Chan. Div., 351, for the reason that the contract there sued upon was in fact enforced, though Justice FRY did say *obiter* that, if a contract valid in France was made in France *to be performed in England,* the English courts would not enforce it if it was against the morals or public policy of England (*pp. 357, 369*).

Eighth.

THE PROVISION IN THE BILL OF LADING THAT THE CONTRACT BE GOVERNED BY BRITISH LAW IS NOT INVALID.

It cannot be fairly said that there is a question in the case whether or not it is against the public policy of this country to permit a carrier by sea to exempt himself from the consequences of his servants' negligence or error. The real question is whether it is against the public policy of this country to permit ship owner and shipper to agree in New York that their contract for a shipment of cattle from New York to England shall be construed according to the place where the final performance of the contract takes place and where, if anywhere, differences as to the performance by the carrier of his engagements would naturally arise.

It is especially proper that where a contract relates to transportation on the high seas from one nation to another, the entire transaction not being under the jurisdiction of any one nation, the parties shall declare in their contract the jurisdiction by the laws of which they intend their contract to be governed.

With such declaration made, it is against public policy and against commercial integrity to permit either party, and especially the party with whom the right to select the forum rests, to insist that the law of the forum, and not the law stipulated in the contract, should be applied to the construction of the contract.

It has been said by this Court that it is against public policy to permit a carrier to exempt himself from the consequences of the negligence of his servants.

Railroad Company vs. Lockwood, 17 Wallace (U. S.), 357, 378.

The rule has been extended from the strict obligations resting upon a carrier by land, to cover those of a carrier by sea.

Liv. & G. W. Steam Co. vs. Phenix Ins. Co., 129 U. S., 397.

At the time this latter decision was made there was no legislative distinction between the obligations and rights of a carrier by sea and of a carrier by land.

Nor, indeed, was there any such distinction at the time these cattle were shipped upon the *Hugo*. But Congress, with whom certainly rests the right to declare the public policy of a country, have since that date passed an Act which provides in terms that :

" If the owner of any vessel transporting merchandise or " property to or from any port in the United States of America, " shall exercise due diligence to make the said vessel in all " respects seaworthy and properly manned, equipped and sup- " plied, neither the vessel, her owner or owners, agent or char- " terers, shall become or be held responsible for damage or " loss resulting from faults or errors of navigation, or in the " management of said vessel, nor shall the vessel, her owner or " owners, charterers, agent or master be held liable for losses " arising from dangers of the sea or other navigable waters, " &c., &c."

27, U. S. Statutes at Large, page 445, Chap. 105, § 3.

The owners of the *Hugo* exercised "due diligence" in the selection of a master.

Captain Gartiez had been nineteen years at sea, and nine years as master of an ocean steamer. He held proper certificates from the Government of Spain as to his competency (*Gartiez, pp. 36, 37*). During thirteen years he had experience in the carriage of cattle, and he had commanded the *Hugo* two years and a half (*Gartiez, p. 37*). In carrying cattle he had been peculiarly capable and fortunate (*Gartiez, p. 43*). As to his general competency the District Judge says :

" His record as a master appears to have been good, and " on any doubtful question of navigation he is entitled to the " benefit of his record." (*Opinion, p. 154.*)

Judge WALLACE, in his opinion, says:

" I am satisfied from the proofs that the master did every- " thing that a prudent and honest navigator would have done " under the circumstances from the time he hove to his vessel " until the hurricane was over." (*Dissenting Opinion, p. 196*).

If, therefore, this loss had occurred subsequent to July 1st, 1893, there would have been no recovery for the libellants under the laws of the United States.

Prior to July 1st, 1893, there could be no recovery for the libellants according to the laws of Great Britain and to those laws they should be remitted.

The Act contains another significant feature.

By Section 1 of the Act it is provided that it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of the vessel did exercise due diligence to properly equip the vessel, and to make her seaworthy, and whereby the obligations of the master, officers or servants to carefully handle and stow the cargo, and to care for and deliver it, shall in anywise be lessened, weakened or avoided.

Section VII., however, specifically provides that the provisions of Section I. " shall not apply to the transportation of " live animals."

This indicates, not only a recognition by Congress, that the carrier by sea shall not be held to the strict accountability of a carrier by land, but, further, that the carrier of live animals by sea should be permitted, in distinction from carriers of other merchandise, to insert provisions in the bill of lading specifically exempting him from responsibility for the acts of master, officers or servants.

The reason is not hard to find. The transportation of live animals involves peculiar difficulties. The animals are ordinarily carried on deck, and may become, if not an actual danger to the vessel and cargo, at least an obstruc-

tion to navigation and a threat of danger. In the treatment of such cargo opinions may well vary. Congress, therefore, sees fit not only to remove from the ship owner all responsibility for the acts of his servants at sea, but to permit him, in respect to live cattle, to specifically recite such exemption in the bill of lading.

Ninth.

IF THIS COURT WILL NOT RE-EXAMINE THE FACTS, AND ACCEPTS THE FACTS AS FOUND BY A MAJORITY OF THE JUDGES OF THE CIRCUIT COURT OF APPEALS, STILL NO LIABILITY RESTS UPON THE SHIP OWNER FOR THE LOSS OF LIBELLANTS' CATTLE UNDER THE CONTRACT OF SHIPMENT, SUCH CONTRACT BEING GOVERNED BY THE LAW OF GREAT BRITAIN.

A majority of the Judges of the United States Circuit Court of Appeals found, as facts, that :

" The injury to and drowning of the maimed animals were " caused by the perils of the sea, but that the non-delivery of " the sound cattle was not caused by a peril of the sea or the " accidents of navigation or circumstances properly incident to " navigation " (*Opinion, p. 195*).

The majority further held, as a matter " undoubtedly true," that the fatally-injured cattle were " properly thrown over- " board " (*Opinion, 193*).

The majority further held that it was apparent

" that the master determined to rid the ship of every head of " cattle except those under the turtleback. He intended to " clear the decks of cattle whether well or injured, and no " effort was made ' to separate the sound from the maimed.' " The cattle not injured were pushed or prodded and driven " across the slippery iron deck, and were hurried over the " gangways as rapidly as possible, and in a short space of time. " ' No attempt was made to discriminate or to save any,' be- " cause the master and the crew wanted none saved. We con- " cur with the District Judge in the conclusion that there was " ' no reasonable or apparent necessity ' for the non-existence " of an attempt to separate the two classes " (*Opinion, p. 193*).

The majority further held that :

" The sacrifice *was not to save the vessel or her cargo*, but " the presence of the cattle during the storm was a great in- " convenience, and there was, as found by the District Judge, " an apprehension that the storm would continue, and that the " existing inconvenience would be increased. The reason for " throwing both sound and maimed cattle overboard was a " great dissatisfaction with the existing state of the decks, an " apprehension that the same state of things would continue, " and a determination to put an end to trouble from cattle " (*Opinion, p. 193*).

And further :

" It was an entire clearance of the decks without apparent " necessity, and with no attempt to discriminate or save any. " *There was no pretense that it was to save the ship or the cargo* " *or that it was necessary to sacrifice these animals for the benefit* " *of the survivors*" (*Opinion, p. 194*)

And further :

" The act of the master was *not* the result of an opinion " that the drowning of the sound cattle was called for by pru- " dential considerations for the ultimate safety of the lives or " the property in his charge " (*Opinion, p. 195*)

The finding of the Commissioner that the cattlemen showed no disposition to try to save any of the cattle, or to seek to have them saved (*Report, p. 172*), is not referred to by the majority of the Court, nor is there any reference to the argument of the respondent that the loss of those cattle that were not fatally wounded was a necessary incident to clearing the deck of the wrecked and maimed cattle, and ought not to be ascribed to either negligence or design on the part of the master (*Report, p. 174*).

Taking the facts just as they are stated by the majority of the Court, the worst case that is established is one of *unjustifiable jettison* by the master, either through panic or unfounded apprehension.

There are several exemption clauses to be considered.

A It was recited in the bill of lading that the cattle were shipped " on deck at owners' risk " (*Exhibit A, p. 136*).

That such a provision should be made respecting a shipment of live animals to be transported on the deck of a freight steamer across the Atlantic, at a tempestuous season of the year, was eminently proper, and due allowance for the risks assumed by the owner of the cattle was undoubtedly made in the rate of freight at which the cattle were accepted for carriage.

In the case of *Burton vs. English*, a similar clause "The "steamer shall be provided with a deck cargo, if required at "full freight, but at merchant's risk" was considered by the Judges of the Queen's Bench Division, who substantially held that it relieved the ship owner from all responsibility for the acts of his servants, except responsibility to contribute in general average in case of lawful jettison or other lawful sacrifice.

Justice BRETT said:

"It is obvious that this is a stipulation in favor of the ship-"owners, for, in order to earn a larger freight, that they may "require part of the cargo to be deck cargo, and then it is to "be at the merchant's risk. My brother CAVE, who delivered "the judgment of the Divisional Court, held that this stipula-"tion absolved the shipowners from liability to contribute to "general average. It must be admitted that if there were an "*improper jettison* by the master and crew, this stipulation "would relieve the shipowners from liability. * * * If the "liability is in consequence of any act of any of his servants for "which the shipowner would be liable but for this stipula-"tion, then it follows that the defendants are freed from "liability. I should say that this stipulation would cover any "act of the master or crew, which being done by them as serv-"ants of the shipowner would otherwise make him liable; *it* "*therefore covers the case of improper jetitson, also a loss caused* "*by a collision or stranding owing to the negligence of the mas-*"*ter or crew.*"

Burton vs. English, L. R., 12 Q. B. Div., pp. 218, 219, 220.

Justice BOWEN said, respecting the clause:

"Now, that clearly is a stipulation in favor of the shipown-"ers, and *prima facie* it seems to me meant to relieve them "from the responsibility of some act of their servants by "which they would otherwise be bound, and from the incidents "of some risk which otherwise would fall upon them as carriers "and under their contract of carriage. *It would, I think,* "*clearly cover improper jettison, also it would cover negligence*

" *of the captain or crew, occasionally stranding or collision, and* " *any other acts, if any there be, of the servants of the shipown-* " *ers for which they would otherwise be responsible.*"
Burton vs. English, L. R., 12 Q. B. Div., 218, 223.

Justice BAGGALLAY concurred in the view of Justices BRETT and BOWEN.

See, also,

Lewis vs. The Great Western Ry. Co., L. R., 3 Q. B. Div.. 195.

McCawley vs. Furness Ry. Co., L. R., 8 Q. B. 57 (1872).

In the latter case the Court says :

" The plea states that it was agreed that the plaintiff, being " a drover travelling with his own cattle, should travel at his " own risk ; that is, he takes his chance, and, as far as having " a right to recover damages, he shall not bring an action " against the company for anything that may happen in the " course of the carriage. It would of course be quite a differ- " ent thing were an action to be brought for an independent " wrong, such as an assault, or false imprisonment. Negli- " gence in almost all instances would be the act of the com- " pany's servants, and ' at his own risk ' would of course ex- " clude that, and gross negligence would be within the terms " of the agreement ; as to wilful, I am at a loss to say what " that means ; but any negligence for which the company " would be liable (confined, as I have said, to the journey, and " it is so confined by the declaration) is excluded by the " agreement ", *pp. 59. 60.*

If sixty-three sound cattle went overboard from the *Hugo*, and their loss is to be attributed to *unjustifiable or improper jettison*, then, under a proper application of the clause " on deck at owner's risk," as construed under the British law, the shipowner is exempt from liability.

The clause referred to was not considered at all by the Judges of the United States Circuit Court of Appeals.

B. A further clause of exemption is contained in the words :

" Steamer not to be held accountable for accident to or " mortality of the animals, from whatever cause arising " (*Exhibit A, p. 136*).

The only question under this exemption, is whether the loss of the cattle was either an " accident " or " mortality." If it was, the clause gives valid exemption to the ship owner.

This clause has already received some consideration from this Court in the case of the *Caledonia*, when it was held that it did not relieve the ship owner from his obligation to provide a seaworthy vessel.

The Caledonia, 157 U. S., 124, 139.

We submit that inasmuch as much the greater portion of the animals lost were wrecked and maimed by perils of the seas, and as the gangways were properly opened to permit the dead and wounded beasts to be swept into the sea, the loss of the others, even if sound, was a necessary incident to clearing the deck, and is in that sense to be deemed " accidental."

C. A further exemption is found in the words :

" It is also mutually agreed that the carrier shall not be " liable for loss or damage occasioned by causes beyond his " control, by the perils of the sea, or other waters * * * " by barratry of the master or crew * * * by collisions, " stranding, or other accidents of navigation, of whatsoever " kind (even when occasioned by the negligence, default or " error in judgment of the pilot, master, mariners or other " servants of the ship owner "), etc., etc. (*Exhibit A, p. 136*).

(**a**) No consideration was given by the Judges of the United States Circuit Court of Appeals to the exemption for loss or damage " occasioned by causes beyond his (the ship- " owner's) control."

The shipowner provided a seaworthy vessel and manned her with a sufficient crew, and placed her under the command of an experienced master, so that, when she started upon her voyage, she was in every way fitted therefor.

That the master should become unreasonably panicstricken, if such was the fact, or that he should, in spite of his qualifications and experience, err in judgment at a critical time when he was more than a thousand miles from the coast, beyond the advice or the authority of the shipowner was a matter entirely " beyond the control " of the shipowner and, by this clause of the bill of lading, when supplemented specifically by the negligence clause, the shipowner is discharged from liability.

That such an exemption is reasonable is now recognized by our own statutes.

27 U. S. Statutes at Large, p. 445, Chap. 105, § 3.

(**b**) The opinion filed by a majority of the judges of the United States Circuit Court of Appeals, says :

" The master's unfounded but existing apprehension in re-
" gard to the future relieves his conduct from the charge of
" barratry. There was a destruction of property, but the Court
" says it was not so much tainted with dishonest views or
" fraudulent breach of trust as to come within the definition of
" barratrous conduct " (*Opinion, p. 195*).

If the master did, in fact, drive cattle overboard not for personal pecuniary profit, but for personal comfort and gratification (*Opinion, pp. 194, 195*), his conduct was barratrous, and the shipowners are relieved from responsibility by the exemption.

Barratry in a contract of carriage bears a different meaning than does the same word in a contract of insurance.

Carver's Carriage by Sea, 2d Edition, §§ 99, 100, pp. 107, 108, 109.

" ' Barratry ' or ' barratry of the master or mariners ' means
" any wilful act of spoliation or violence to the ship or goods,
" or any fraudulent or consciously illegal act which exposes
" the ship or goods to danger of damage, destruction or con-
" fiscation, done by the master or crew without the consent of
" the shipowner.

" For example, if goods are lost or damaged by the master
" wilfully running the ship upon rocks or attempting to scuttle
" her ; or through a fraudulent delay or deviation upon the voy-
" age for the master's private purposes ; or by the ship and
" cargo being fraudulently sold by the master ; the exception
" relieves the shipowner from responsibility for such losses.
" So, again, if the goods become confiscated owing to the mas-
" ter using the ship for purposes of smuggling, or trading with
" an enemy, or running a blockade. *And the effect is the same*
" *although the master was intending to act for the benefit of the*
" *owners.*"

Carver's Carriage by Sea, 2d Edition, § 99, pp. 107, 108.

(**c.**) If the immediate cause of loss is to be deemed an " accident of navigation," the shipowner is freed from liability,

even though such accident was remotely due to the negligence, default or error in judgment of the pilot, master or mariners of the ship.

Carver's Carriage by Sea, 2d Ed., § 101, p. 110.
The Duero, L. R., 2 Ad. & Ecc., 393 (1869).
Grill vs. General Iron Screw Collier Co., L. R., 1 C. P., 600 (1866).
The Cressington, L. R., 1 Prob., 152 (1891).

Tenth.

IT IS A MATTER OF PECULIAR INTEREST THAT THIS COURT SHOULD DECLARE THE EFFECT OF A CLAUSE WHICH PROVIDES THAT THE BILL OF LADING SHOULD BE GOVERNED BY A LAW OTHER THAN THE LAW OF THE PLACE OF ISSUE.

The question has arisen in numerous cases, but there is as yet no authoritative decision in any appellate tribunal.

The clause has been sustained as valid in the District Court of the United States for the District of Maryland.

The Oranmore, 24 Fed. Rep., 922.

It has been rejected as invalid in the District Court of the United States for the Southern District of New York, and in the District Court of the United States for the District of Massachusetts.

The Brantford City, 29 Fed. Rep., 373, 396.
The Guildhall, 58 Fed. Rep., 796.
The Iowa, 50 Fed. Rep., 561.

No appellate tribunal has passed upon the validity of the clause, and no certainty can be felt by the enormous commercial and shipping interests using bills of lading until the question has been adjudicated in this Court.

There is not involved any question as to abandoning the declarations of public policy already made by this Court respecting the exemption of a carrier from the consequences of his servants' negligence.

There is not involved even the question of a modification of such declarations, because of the provisions of the Harter Act.

27 U. S. Statutes at Large, p. 445.

There is not involved any question of introducing the law of a foreign country for the construction of the terms of contracts made and performed here.

The question is, whether a shipper and a shipowner may in contracting here for the transportation of cargo from this country to a foreign country, validly stipulate that any disputes or differences under the contract shall be determined by the law of the country where the shipment is to be delivered.

We submit that it is "reasonable and just in the eye of the "law" for the parties to agree to submit their rights to the law of the place where their relations will naturally terminate. If the Court holds that such a stipulation is "reasonable and just in the eye of the law," then the contract must be sustained, even though such foreign law does differ from the law of the United States.

Railroad Co. v. Lockwood, 17 Wall., 357, 380, 384.

No question has ever been raised in either pleadings or proofs as to the regularity of the clause in the bill of lading.

It was there properly, in accordance with the terms of the original memorandum contract, and, though it was fully pleaded by the respondent, there has been no suggestion by the libellants of irregularity or surprise.

The original contract made October 10th, in terms provided that a bill of lading should issue whose conditions should govern any questions not provided for in the contract (*Exh. 2, p. 133*). Pursuant to this contract the bill of lading was issued (*Exh. A, p. 136*). This bill was accepted by the libellants without question. When the libel was filed it was based upon the bill of lading (*Libel, Art. 1st., p. 2*), and there is no allegation in the libel, or any suggestion in the proofs, that the bill of lading was any different in form or in tenor than the libellants expected to receive under the terms of their contract.

The conditions of the bill of lading are pleaded in the answer of the respondent (*Ans., Art. 7, pp. 4, 5*).

In regular course the bill of lading was proved and testimony adduced to meet its several conditions.

At no stage of the trial has there been any intimation from the libellants of irregularity or surprise in respect to the form or conditions of the bill of lading which they received from the steamer, and upon which their libel was founded.

Eleventh.

A MANDATE SHOULD ISSUE TO THE UNITED STATES CIRCUIT COURT OF APPEALS, DIRECTING THAT THE ORDER OF AFFIRMANCE MADE BY THEM MARCH 18TH, 1895, BE VACATED, AND THAT A NEW ORDER BE ENTERED REVERSING THE DECREE OF THE DISTRICT COURT, AND DIRECTING THE DISTRICT COURT TO DISMISS THE LIBEL AND TO DECREE THE PAYMENT BY THE LIBELLANTS TO THE OF THE COSTS OF ALL THE COURTS.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Proctors for Appellant.

WILHELMUS MYNDERSE,
Advocate.